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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. _____

Bob Bullock, Comptroller of Public Accounts
of the State of Texas,
Petitioner

V.

Day and Zimmerman, Incorporated,
Respondent

and

United States of America,
Intervenor

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS

Petitioner, Bob Bullock, Comptroller of Public Accounts of the State of Texas, successor in office to Robert S. Calvert, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Texas in this proceeding.

OPINIONS BELOW

The opinion of the 126th Judicial District Court of Travis County, Texas, is not reported but is reproduced as Appendix II hereto. It also appears in

Record 1, Transcript, p. 35. The opinion of the Court of Civil Appeals, Third Supreme Judicial District of Texas, is reported at 504 S.W.2d 945. The Opinion of the Supreme Court of Texas is reported at 519 S.W.2d 106 and is also reproduced as Appendix III hereof.

JURISDICTION

The Judgment of the Supreme Court of Texas was entered on January 29, 1975. Petitioner timely filed a Motion for Rehearing which the Supreme Court of Texas denied on the 5th day of March, 1975, and this petition for certiorari was filed within ninety (90) days of that date as required by 28 USC 2101(c). The Court's jurisdiction is invoked under 28 USC 1257 (3).

QUESTIONS PRESENTED

1. Whether the immunity of the United States from payment of state sales taxes should be extended to independent contractors performing services for the United States under cost-plus-fixed-fee contracts.

2. Whether the title provision /Art. VI-B(c)/ in the prime contract between Day and Zimmerman and the United States effected a "resale" of certain tangible personal property from Day and Zimmerman to the United States as contemplated by Art. 20.01(S) and Art. 20.04 (N), Title 122A, Taxation-General, V.A. T.S.

STATUTES INVOLVED

Articles 20.01 G(1), I(1), J(1)(a), K(1), R and S; 20.02; 20.021(A), (G) and (I); 20.03; 20.04 A, C, F, and N, all of Chapter 20, Title 122A, Taxation-General, V.A.T.S. All of these statutes are found in the separately bound Appendix. The alphabetization of Article 20.04 changed in 1969. The references given are for the statutes in effect for the period in question (1964-1968) and current citations for these statutes are provided in the Appendix.

STATEMENT OF THE CASE

Respondent, Day and Zimmerman, a Maryland corporation with principal offices in Philadelphia, Pennsylvania, is the contractor-operator of Lone Star Army Ammunition Plant (hereinafter referred to as LSAAP) located in Bowie County, Texas, near Texarkana. Under its contract with the Intervenor-the United States, Day and Zimmerman loads, assembles, and packages ammunition and components thereof. Pursuant to the provisions of the Texas Sales and Use Tax Act, Vol. 20A, Title 122A, Tax.-Gen., V.A.T.S. and Article 1066(C), V.A.T.S. (all pertinent portions are reproduced as Appendix I), Petitioner sought to tax those supplies purchased and consumed by Day and Zimmerman in the performance of its contract for the period from April 1, 1964, to October 1, 1968. The taxes were not levied on any of the component parts that went into the assembled ammunition and munitions received by the United States, but were imposed only on taxable supplies such as computer time and other equipment leased by Day and Zimmerman, station-

ery, toilet paper, pencils, other secretarial supplies, ice, light bulbs and charges for the printing and supplying of the plant newspaper for Day and Zimmerman employees.

After exhausting all administrative appeals before the Petitioner, Day and Zimmerman sued Petitioner on January 22, 1971, in the 126th District Court of Travis County, Texas, requesting refund of the taxes at issue. On August 5, 1971, the United States intervened because under its contract with Day and Zimmerman, the United States is required to reimburse Day and Zimmerman for all costs incurred in the performance of the contract, including taxes, penalty and interest paid by Day and Zimmerman. (Record 2, Stipulation 15).

In a non-jury trial the court rendered Judgment on May 25, 1973, for Day and Zimmerman and the United States to recover $112,668.42 in taxes, penalty and interest. (Record 1, Transcript p. 35). The Petitioner appealed to the Court of Civil Appeals for the Third Supreme Judicial District of Texas. That court reversed and rendered judgment that Day and Zimmerman and the United States take nothing by their suit. (Record 5). The Court of Civil Appeals overruled the Motion for Rehearing on February 6, 1974, and Day and Zimmerman and the United States then filed Application for Writ of Error in the Supreme Court of Texas on March 11, 1974. (Record 8). The Supreme Court of Texas reversed the judgment of the Court of Civil Appeals and affirmed the judgment of the trial court in all respects. (Record 12). In so doing the court held Day and Zimmerman to be an independent con-

tractor, not an agent of the United States, and that Article VI-B(c) of the contract effected a "sale" from Day and Zimmerman to the United States which is exempted from taxation by the United States Constitution.

Petitioner's Motion for Rehearing in the Supreme Court of Texas was overruled on the 5th day of March, 1975. (Record 15).

REASON FOR GRANTING THE WRIT

> The decision of the Supreme Court of Texas granting this contractor immunity from Texas sales taxes directly and irreconcilably conflicts with three decades of decisions of this Court concerning entities contracting with the United States, beginning with the 1941 case of Alabama v. King & Boozer, 314 U.S. 1.

Day and Zimmerman contracts with the United States to provide the expertise necessary to produce munitions for the United States Army. The United States pays Day and Zimmerman all costs incurred plus a fixed fee. In performing the contract, Day and Zimmerman must purchase two categories of goods: (1) materials which are used in the actual manufacture of the munitions; (2) supplies which Day and Zimmerman consumes and which do not directly enter the manufacturing process. The law of the State of Texas provides that those materials which become an integral or component part of a manufactured product are not taxable. /Article 20.04(C)(1)(a), Appendix, p. 9/ Petitioner contends

that the Texas Sales Tax Act does impose a sales tax on those consumable supplies purchased and used solely by Day and Zimmerman. /Art. 20.04 (C)(1)(b)(ii)(iii), Appendix, p. 9/.

TAX LIABILITY BASED ON THE LEGAL-INCIDENCE TEST

The primary issue in this case is whether or not a sales tax assessed by a State against an independent contractor doing business with the United States under a cost-plus contract wherein the United States must reimburse the contractor for all costs, including taxes, is, in effect, a tax against the United States. The repugnancy of a tax to the United States Constitution is determined by the legal incidence of the tax as opposed to its ultimate economic burden.

This Court, in James v. Dravo Contracting Co., 302 U.S. 134 (1937), established the test of looking to the "legal incidence" of a state tax in deciding whether that tax is validly assessed against an independent contractor performing its contract with the United States. In the 1941 case of Alabama v. King & Boozer, supra, a case whose fact situation is synonymous to the case at bar, and in Curry v. United States, 314 U.S. 14 (1941) this Court held that in determining the validity of Alabama Sales and Use Taxes, respectively, the implied constitutional immunity of the United States was not a bar to the imposition of the taxes on a cost-plus type government independent contractor.

The "legal incidence" test as established by this Court in these cases supports the principle that a

mere showing of the burdensome effects of the tax upon the United States is insufficient to invoke constitutional immunity.

The legal versus the economic incidence test was best summarized in the so-called "Michigan cases." In United States v. City of Detroit, 355 U.S. 466, 472 (1958), this Court held:

> "We are aware of course that the general principles laid down in Dravo, King & Boozer and subsequent cases do not resolve all the difficulties in the area of intergovernmental tax immunity, but they were adopted by this Court, with the full support of the Government, as the least complicated, the most workable and the proper standards for decision in this much litigated and often confused field and we adhere to them."

In City of Detroit, et al, v. Murray Corporation of America et al, 355 U.S. 489, 494 (1958), this Court stated:

> "Of course the government will eventually feel the financial burden of at least some of the tax but the one principle in this area which has heretofore been clearly settled is that the imposition of an increased financial burden on the government does not by itself invalidate a state tax."

The facts in this case, including the sale of

certain supplies to Day and Zimmerman, the passing of title to these supplies to the United States upon delivery by the vendors, and the reimbursement provision in the contract are synonymous with the facts in Alabama v. King & Boozer, supra. Therefore, the legal incidence of the taxes is not on the United States so as to invoke the doctrine of implied constitutional immunity even though the United States has contractually obligated itself to reimburse Day and Zimmerman for these taxes. This obligation is found in Title IV-A(1)(j) of the Prime Contract as follows:

> "Payments incident to the performance of the work under this contract made by the Contractor. . .and any disbursement required by laws, regulations or ordinances of the United States of America or of the State, territory or political sub-divisions thereof, wherein the work is done, or for any plant, equipment, process, organization, materials, supplies, personnel or on money received as reimbursement therefor, including permits, licenses, fees, taxes, . . ." (Record 3).

Such contractual liability will not bring constitutional immunity into play. As Justice Douglas stated, with Justice Rehnquist concurring, in a dissent in United States v. Mississippi Tax Commission, 412 U.S. 363 (1973):

> "At least since Alabama v. King & Boozer, . . .state taxes have been up-

held on those doing business with the Federal Government even as respects cost-plus contracts where the terms of the contract force their payment out of the Federal Treasury.[5]

5. In New York v. United States, 326 U.S. 572. . .in discussing the Federal Government's right to levy taxes on New York State's sale of mineral waters, the Court stated, 'In the older cases, the emphasis was on immunity from taxation. The whole tendency of recent cases reveals a shift in emphasis to that of limitation of immunity. They also indicate an awareness of the limited role of courts in assessing the relative weight of the factors upon which immunity is based . . .' " 412 U.S. at 386, 387.

In this case, the Texas Supreme Court found Day and Zimmerman to be an independent contractor with the United States (Appendix, p. 28), thus eliminating the question of agency. Article 20.021(A), Title 122A, V.A.T.S. places the legal incidence of the Texas sales tax upon the purchaser, while the tax is collected by vendors at the time of the sale (Appendix, p.4). Day and Zimmerman purchased these supplies from its vendors without paying the taxes by giving "resale certificates" to the vendors attesting to Day and Zimmerman's intention to resell the supplies and not use them itself. Once Day and Zimmerman began using the computer time and these office supplies it became liable for the sales tax pursuant to Article 20.021(I). (Appendix, p. 7).

Petitioner therefore submits that the above-cited authorities conclusively establish that in the case at bar the legal incidence of the taxes rests upon Day and Zimmerman, not the United States, and that constitutional immunity does not invalidate or prevent the assessment of these sales taxes against Day and Zimmerman.

THE "SALE FOR RESALE" ARGUMENT

The decision of the Supreme Court of Texas that the title provision in Day and Zimmerman's contract with the United States /Article VI-B(c), Prime Contract, Record 3/ effected a sale of the supplies from Day and Zimmerman to the United States directly conflicts with previous interpretations by this Court of such contractual provisions. Its misinterpretation of Article VI-B(c) of the Prime Contract caused the Texas Supreme Court to find a "sale for resale" pursuant to Articles 20.01(K)(1), 20.01(S) and 20.04(N). (Appendix, p. 2, 3, 13). When the Prime Contract is properly construed, no such "sale for resale" exists and these statutes are not invoked. The title provision in the Prime Contract states:

> "Title to all property furnished by the Government shall remain in the Government. Title to all property purchased by the contractor, for the cost of which the contractor is entitled to be reimbursed as a direct item of cost under this contract, shall pass to and vest in the Government upon delivery of such property by the vendor. . ." /Record 3, Art. VI-B(c)/.

In deciding whether the automatic title passage to the United States effects a "resale" of the supplies to the United States, one must look to the definition of "sale for resale" found in Articles 20.01(S) and 20.04(N). (Appendix, p. 3, 13). Article 20.01(S) defines "sale for resale" in part to be:

> "Sale for Resale" shall mean a sale of tangible personal property to any purchaser who is purchasing said tangible personal property for the purpose of reselling it in the normal course of business either in the form or condition in which it is purchased, or as an attachment to, or integral part of, other tangible personal property."

Article 20.01(K)(1) defines "sale" in part to be:

> "Sale" means and includes any transfer of title or possession, or segregation in contemplation of transfer of title or possession,. . .in any manner or by any means whatsoever, of tangible personal property for a consideration. (Emphasis added).

The Court should first observe that Day and Zimmerman is not a purchaser under the above definition of "sale for resale." Day and Zimmerman must be a "purchaser who is purchasing said tangible personal property for the purpose of reselling it. . .in the normal course of business. . ." That Day and Zimmerman was not purchasing the supplies from its vendors for the purpose of resale

and that the transferring of title to the supplies to the United States was not in Day and Zimmerman's normal course of business is plainly shown by Stipulation No. 9, which states:

> "that under the terms of the prime contract the plaintiff's function is to load, assemble and package ammunition and components thereof." (Record 2).

Day and Zimmerman purchased these supplies for its own use and it was not engaged in the type of business which qualified it to use a "resale certificate" in purchasing these supplies.

We first turn our attention to the vendor's sales to Day and Zimmerman and whether these sales are subject to sales tax.

Day and Zimmerman, like the contractor in King & Boozer, purchased in its own name and on its own credit (Record 2, Stipulations 46, 50). Under the cost-plus contract, the United States incurs no liability for these purchases and only reimburses the contractor. Day and Zimmerman purchased from its vendors with purchase order forms which provided that the purchase was between Day and Zimmerman and the vendor without the involvement of the United States. (Opinion of the Texas Supreme Court, Appendix, p. 32).

Clearly, the vendors' transfers to Day and Zimmerman of supplies such as computer time, light bulbs and toilet tissue for consideration constitute sales under Article 20.01(K)(1). (Appendix,

p. 2). Once this sale is established, Day and Zimmerman becomes liable for the tax unless it can show there was a "resale" to the United States thus invoking the "sale for resale" exemption. /Art. 20.04(N), Appendix, p. 13/.

Thus, under the Texas Sales Tax provisions, Day and Zimmerman's transactions with the United States do not come under the "sale" or "resale" definitions. Moreover, this Court's holding in King & Boozer is squarely against the contentions of Day and Zimmerman and the holding of the Texas Supreme Court. The automatic-passage-of-title provisions in the contract are utilized not to effect "sales" to the United States but to protect the United States from its creditors.

The State of Alabama urged in its brief to this court in King & Boozer that such a title provision is for the primary purpose of eliminating insurance costs, and should be construed as a security provision because the vesting of title in the Government affords protection and security without affecting the contractors' rights to use the material in the discharge of their contractual obligations.

The protection against the independent contractor's bankruptcy is often the rationale behind the United States' employment of these automatic-passage-of-title provisions. See Boeing v. Omdahl, 169 N.W.2d 696 (1969).

In the cases of King & Boozer and Curry, supra, Esso Standard Oil Company, 345 U.S. 495 (1953); United States et al v. the City of Detroit, 355 U.S.

466 (1958); United States v. Township of Muskegon, 355 U.S. 484 (1958); and City of Detroit et al v. Murray Corporation of America et al, 355 U.S. 489 (1958), the United States held "Title" to the goods or property which was the subject or basis of the taxes, yet the assessment against the private taxpayer was upheld.

In City of Detroit v. Murray Corp., this Court spoke to the issue of actual possession and use of property versus "paper title" to property and stated:

> "Consequently in determining whether these taxes violate the Government's constitutional immunity we must look through form and behind labels to substance. This is at least as true to uphold the State tax as to strike one down . . .
>
> It is true that the particular Michigan taxing statutes involved here do not expressly state that the person in possession is taxed "for the privilege of using or possessing" personal property, but to strike down a tax on the possessor because of such verbal omission would only prove a victory for empty formalisms. And empty formalisms are too shadowy a basis for invalidating State tax laws." 355 U.S. at 492,493 (Emphasis added)

In a manner superior to any this Petitioner could muster, this Court, as quoted above, struck a blow

for substantive application of the law and against the rule of law by empty formalism. The position of Day and Zimmerman and the United States depends entirely upon the empty formalism of an obscure title passage provision, the sole reason for which is to protect the United States from its contractor's creditors. Yet, faced with the Texas sales tax, Day and Zimmerman seeks to use that same obscure title passage provision to effect a "sale for consideration" to the United States. This is precisely the "empty formalism" that this Court struck down in City of Detroit v. Murray Corp.

Petitioner acknowledges that the United States Government could bind itself to purchase goods directly from vendors, and in doing so, be exempt from taxation in such a transaction. Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110 (1954), is an example of purchases by a government contractor wherein this Court held the United States was the real purchaser. This Court compared Kern-Limerick with King & Boozer case thusly:

> "The contract here in issue differs in form but not in economic effect on the United States. The nation bears the burden of the Arkansas tax as it did that of Alabama. The significant difference lies in this. Both the request for bids and the purchase order (in Kern-Limerick), in accordance with the contract arrangement making the contractors purchasing agents for the Government . . .contain this identical, specific provision:

> 3. This purchase is made by the Government. The Government shall be obligated to the vendor for the purchase price, but the contractor shall handle all payments hereunder on behalf of the Government. The vendor agrees to make demand or claim for payment of the purchase price from the Government by submitting an invoice to the contractor.
>
> Title to all materials and supplies purchased hereunder shall vest in the Government directly from the vendor. The contractor shall not acquire title to any thereof.
>
> The purchase order is headed 'Navy Department Bureau of Yards and Docks . . .' " 347 U.S. at 119.

Kern-Limerick affirmed the long course of judicial construction which establishes the principle that the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest. 347 U.S. at 121. In the King & Boozer and Kern-Limerick cases, and obviously in this case, the identical, critical issue is who purchased these supplies, the United States or the Independent Contractor. The issue is not one of State law so much as it is one of construing the government's

contract and determining whether the terms of that contract, particularly Article VI-B(c), (the title passage provision) and Article IV-A(1)(j), (the reimbursement provision), trigger the application of Articles 20.01(K)(1) and 20.04(N), to extend the constitutional immunity of the United States to Day and Zimmerman.

In their Application for Writ of Error to the Supreme Court of Texas, Day and Zimmerman and the United States urge that the facts of King & Boozer are startlingly different from the case at bar (App. Writ. Error, Record 8, p. 6). Petitioner submits that two cases are rarely more similar. In both King & Boozer and the case at bar, three parties are identically situated. The United States, via the U. S. Army has entered into a cost-plus contract with an Independent-Contractor (Respondent Day and Zimmerman herein; Dunn Construction Company and John S. Hodgson and Company in King & Boozer) to perform certain tasks (manufacturing munitions herein, erecting a fort in King & Boozer) and in doing so, the United States contracted to reimburse said independent contractors for all labor, materials, tools, machinery, equipment, facilities, supplies, utilities, and services necessary to perform the contract. The contractors in each case purchased supplies from vendors (King & Boozer, a lumber dealer, in the Alabama case; from various vendors in the instant case.)

To decide whether under the prime contract the United States purchased the supplies from Day and Zimmerman, we must look again to the definition of a "sale" in Article 20.01(K)(1), supra. The "resale"

to the United States must satisfy this definition of a "sale." In the transaction at issue, Respondent did not transfer title to the supplies to the United States "for a consideration" as required by the statute. The Supreme Court of Texas overlooked the fact that the Government's contract provided for no consideration for the passage of title to the United States. Title to the supplies passed and vested "in the Government upon delivery of such property by the vendor." /Article VI-B(c), Prime Contract, Record 37/. The passing of title did not depend on any acts performed either by Day and Zimmerman or the United States.

Pausing for a moment to regroup our thoughts, we observe just what transactions occurred between the United States and Day and Zimmerman. The United States contracts with private contractors such as Day and Zimmerman to secure that contractor's "know-how." At the trial of this case, testifying for Day and Zimmerman and the United States, Colonel Richard Huff, the contracting officer's representative under this contract, stated the reasons for employing such independent contractors: "They, (the Army) hire a contractor to come in and start the facility and run the facility. They hire 'know-how' the quickest way they can, and that is hiring an experienced contractor to do the job." To paraphrase the brief of the State of Tennessee to this Court in the case of United States v. Boyd, 378 U.S. 39 (1964):

> "What any contractor is paid for is the exercise of his knowledge, skill and labor in effectuating designated work, whether

> the work be the delivery of a completed edifice or structure, or the continuous management and operation of an industrial complex. He is not in any real sense a dealer in materials for profit. His undertaking consists usually of taking materials, whether procured by himself or others, and changing their form or identity so something new is created. It is for his knowledge, ingenuity, and skill in the application of labor that he is compensated, and that compensation forms his primary, if not exclusive, motivation for his efforts." (Reply Brief of Appellee, p. 42, 43)

What the United States received when it contracted with Day and Zimmerman was Day and Zimmerman's "know-how." Thus the money that changes hands under this contract, the reimbursement for costs and the fixed fee, is paid to Day and Zimmerman by the United States Army for Day and Zimmerman's technical expertise, and not for supplies or even for materials procured under this contract. These reimbursements and the payment of the fixed fee can in no way be taken as consideration for the automatic transfer of title to consumable supplies to the United States.

Consideration is defined as "the price bargained for and paid for a promise." (Simpson on Contracts, 2nd. Ed., p. 80). Black's Law Dictionary states further:

> "The inducement to a contract. The

> cause, motive, price, or impelling influence which induces a contracting party to enter into a contract. The reason or material cause of a contract." (4th ed., Page 379).

The United States argues that the moneys it reimbursed to Day and Zimmerman under Article IV-A of the contract constitute the consideration for a sale. In looking to the definition of reimbursement in Black's Law Dictionary at page 1452, we find that the primary meaning of this word is

> "To pay back, to make restoration, to repay that expended; to indemnify, or make whole."

The Prime Contract calls for "reimbursement," not for "consideration." The United States reimburses Day and Zimmerman for the "cost of its operation of LSAAP" (Record 2, Stipulation 14) and for the "cost of the property purchased by Day and Zimmerman." /Record 3, Art. IV-A(1)(j), Prime Contract/. This reimbursement is not equivalent to consideration.

The United States never paid a "consideration" to Day and Zimmerman for a transfer of title to the consumable supplies. This is even more obvious when one considers that Day and Zimmerman consumed all of these supplies internally in its performance of the prime contract. Day and Zimmerman, and not the United States, used the pencils, stationery, light bulbs and computer time. (See Record 2, Stipulations 58 and 59). The United States

never used or directly benefitted from the items consumed by Day and Zimmerman, and could not use them for its own benefit. It would be ridiculous to burden the United States with paying good and valid consideration (in the form of the reimbursements) for the title to supplies wherein the passage of title did not effect an actual transfer or shift in the use of the goods to the United States. That the United States was "reimbursing for costs" and not providing "consideration for a transfer of title" is the key issue which the Texas Supreme Court failed to see. In its opinion (Appendix, p. 31) the court states:

> "In determining whether a sale took place between Day and Zimmerman and the Federal Government, the pertinent inquiry to be made under the facts of the instant case and the definition of a sale set out above is whether there was a transfer of title or possession from Day and Zimmerman to the United States."

The Court glaringly omitted the phrase "for consideration" from its interpretation of the contract and equated the transfer of title provision in the Prime Contract with the transfer of title in Article 20.01 (K)(1) of the Texas Sales Tax Act. The fallacy in equating these two transfer provisions is evident in that the transfer of title to the United States under the Prime Contract is not dependent on the payment of a consideration. Therefore, it is not a "sale" because the transfer of title in Article 20.01(K)(1) is expressly dependent on consideration. (Appendix, p. 2).

The automatic title passage to the United States is a transfer without consideration and cannot be the type of transfer which constitutes a sale under Texas Sales Tax Law. Justice Douglas, in his dissent in Kern-Limerick, aptly points out the fallacy in attributing magical qualities to contractual terms when deciding cases of Constitutional significance. He stated that the two paramount issues of a case such as this are to ascertain the "substance of the transaction" and the "nature of the economic burden on the United States." He went on to say:

> "The concepts 'title', 'agency', and 'obligation to pay' are no basis for this constitutional adjudication. Today they are used to permit any government functionary to draw the constitutional line by changing a few words in a contract. When the Congress deliberates over this problem as it often has, it does not worry about the passing of title or other legal technicalities. The Congress debates whether as a matter of policy, including the need of the states for revenue the holder of a cost-plus government contract should be immune from state taxation.
>
> Alabama v. King & Boozer and the cases it followed were a long step forward from the time when a state's power to tax was nullified whenever the federal treasury was even remotely affected. We should not take this equally long step backwards. We should hold that until the Congress

> says differently, the states are free to tax all sales to cost-plus government contractors. We should dispense with fruitless talk of agency, titles, and obligations to pay. The legal incidence of a tax is a matter for the states to determine. We should decide today, as we did more than a decade ago, that a tax on a contract for goods he uses is constitutional, even though the economic burden falls on the federal government. (347 U.S. at 126, 127) (Emphasis added).

Furthermore, because the facts in the case at bar are so clearly parallel to those in King & Boozer and the other cases cited, and are so unlike those in Kern-Limerick, Petitioner urges that the United States, under Texas law, is not a purchaser of these consumable supplies. It does not use them and pays no "consideration" for them. Therefore, there can be no "sale" of these supplies from Day and Zimmerman to the United States. If there is no such "sale," then it follows there can be no "sale for resale" by the vendors to Day and Zimmerman. The "sale for resale" exemption being the means by which Day and Zimmerman seeks to evade the tax, the nonavailability of such exemptions places the legal incidence of the sales tax for these consumable supplies purchased and used by Day and Zimmerman squarely on Day and Zimmerman as the ultimate purchaser and user thereof.

CONCLUSION

It is respectfully submitted that the decision of the court below is incorrect and that a writ of certiorari should issue in this case to review the matter and thereafter the judgment of the Supreme Court of Texas should be reversed.

Respectfully submitted,

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May 22, 1975

CERTIFICATE OF SERVICE

I, RICK HARRISON, Attorney for Petitioner herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 23rd day of May, 1975, three copies of the foregoing Petition for Certiorari to the Supreme Court of the United States were served upon the Attorneys for Respondent and Intervenor, Mr. Charles J. Hlavinka at Post Office Box 1049, Texarkana, Texas, 75501, and Mr. Hugh P. Shovlin, Assistant United States Attorney at Post Office Box 1701, San Antonio, Texas, 78206, by mailing same by United States Mail, first-class postage prepaid; the Solicitor General of the United States, United States Department of Justice, Washington, D. C., 20530, and Mr. David English Carmack, Attorney, United States Department of Justice, Washington, D. C., 20530, by mailing same by United States Mail, Air Mail postage and prepaid.

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ATTORNEY FOR PETITIONER

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APPENDIX I

RELEVANT PROVISIONS FROM VOLUME 20A, TITLE 122A, TAXATION-GENERAL, V.A.T.S.

APPENDIX I

From Volume 20A, Title 122A, Taxation-General, V.A.T.S.

Art. 20.01 Title-Definitions

This Chapter is known and may be cited as the "Limited Sales, Excise and Use Tax Act," and the following words shall have the following meanings unless a different meaning clearly appears from the context:

(G) Purchase. "Purchase" means:

(1) Any transfer of title or possession, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration.

(I) Retail Sale or Sale at Retail. "Retail Sale" or "Sale at Retail" means:

(1) Any sale of tangible personal property.

(J) Retailer.

(1) "Retailer" includes:

(a) Every seller engaged in the business of making sales of tangible property for storage, use or other consumption or in the business of making sales at auction of tangible personal property owned by the person or others for storage, use or other consumption.

(K) Sale.

(1) "Sale" means and includes any transfer of title or possession or segregation in contemplation of transfer of title or possession, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration.

(R) Use. "Use" includes the exercise of any right or power over tangible personal property incident to the ownership of that tangible personal property except that it does not include the sale of that tangible personal property in the

regular course of business. "Use" specifically includes the incorporation of tangible personal property into real estate or into improvements upon real estate without regard to the fact that such real estate and improvements may subsequently be sold as such except as provided in Article 20.01 (T) (2).

(S) Sale for Resale. "Sale for Resale" shall mean a sale of tangible personal property to any purchaser who is purchasing said tangible personal property for the purpose of reselling it in the normal course of business either in the form or condition in which it is purchased, or as an attachment to, or integral part of, other tangible personal property. A sale for resale shall include a sale of tangible personal property to a purchaser for the sole purpose of that purchaser's renting or leasing said tangible personal property to another person, but not if

incidental to the renting or leasing of real estate.

Art. 20.02. Imposition of Limited Sales Tax

There is hereby imposed a limited sales tax at the rate of three per cent (3%) on the receipts from the sale at retail of all tangible personal property within this State.

Art. 20.021 Method of Collection; Bracket System

(A) Every retailer shall add the sales tax imposed by Article 20.02 of this Chapter to his sale price and when added the tax shall constitute a part of the price, shall be a debt of the purchaser to the retailer until paid, and shall be recoverable at law in the same manner as the purchase price. It is further specified that where tangible personal property is segregated in contemplation of transfer

of title or possession and is thereafter to be transported by common carrier from the seller to the buyer, with the price fixed F.O.B. the seller's place of business, and with transportation charges separately stated, the tax herein imposed shall be computed only upon the basis of the charge for the tangible personal property itself, exclusive of the separately stated and independently fixed transportation charges. When the sale price shall involve a fraction of a dollar, the tax shall be added to the sale price upon the following schedule:

Amount of Sale	Tax
$ .01 to $ .16	No Tax
.17 to .49	$ .01
.50 to .83	.02
.84 to 1.16	.03
1.17 to 1.49	.04
1.50 to 1.83	.05

Provided, that for successive brackets for this schedule in this paragraph, the tax shall be computed by multiplying three per cent (3%) times the amount of the sale.

Any fraction of one cent ($.01) which is less than one half of one cent ($.005) of tax shall not be collected. Any fraction of one cent ($.01) of tax equal to one half of one cent ($.005) or more shall be collected as a whole cent ($.01) of tax.

When several articles or items of tangible personal property are purchased together and at the same time, the tax shall be computed on the total amount of the several items less the amount paid for any article or item of tangible personal property specifically exempt under the provisions of Article 20.04 of this Chapter.

The use of tokens or stamps for the purpose of collecting or of enforcing the collection of the tax imposed in this Chapter or for any other purpose in connection with such tax is prohibited.

(G) Effect of Resale Certificate. The resale certificate relieves the

seller from the burden of proof only if taken in good faith from a person who is engaged in the business of selling, leasing or renting tangible personal property. A resale certificate may be given by a purchaser, who at the time of purchasing the tangible personal property, intends to sell, lease or rent it in the regular course of business or is unable to ascertain at the time of purchase whether the tangible personal property will be resold, leased or rented in the regular course of business or will be used for some other purpose.

(I) Liability of Purchaser Giving Resale Certificate. If a purchaser who gives a resale certificate makes any use of the tangible personal property other than retention, demonstration or display while holding it for sale, lease or rental in the regular course of business, the use shall be taxable to the purchaser as of

the time when the tangible personal property is first so used, and the sales price of the tangible personal property to him shall be deemed the measure of the tax.

Art. 20.03. Imposition and Rate of Use Tax

An excise tax is hereby imposed on the storage, use or other consumption in this State of tangible personal property purchased, leased or rented from any retailer on or after September 1, 1961, for storage, use or other consumption in this State, at the rate of three per cent (3%) of the sales price of the property, or in the case of leases or rentals, of said lease or rental prices.

Art. 20.04 Exemptions

(A) Constitution and Statutory Exemptions. There are exempted from the taxes imposed by this Chapter the receipts from the sale, lease or rental of the storage, use or other consumption

in this State of tangible personal property the gross receipts from the sale, lease or rental of which, or the storage, use or other consumption of which, this State is prohibited from taxing under the Constitution or laws of the United States or under the Constitution of this State. [Current Article: 20.04 (C)]

(C) Property Used in Manufacturing, Packaging and Containers.

(1) Tangible Personal Property Used in Manufacturing. There are exempted from the taxes imposed by this Chapter the receipts from the sale, lease or rental of and the storage, use or other consumption in this State of:

(a) Tangible personal property which will enter into and become an ingredient or component part of tangible personal property manufactured, processed or fabricated for ultimate sale at retail within or without this State; and

(b) Tangible personal property used or consumed in or during any phase of such actual manufacturing, processing or fabricating operation, provided that the use or consumption of such tangible personal property is necessary or essential to the performance of such operations. Chemicals, catalysts, and other materials which are used during such operations and which are used for the purpose of producing or inducing a chemical or physical change during such operations or for removing impurities or otherwise placing a product in a more marketable condition are included within the exemption, as are other articles of tangible personal property used in such a manner as to be necessary or essential in the actual manufacturing, processing, or fabricating operations. The exemption provided herein does not include the following:

(i) Machinery, equipment and re-

placement parts and accessories therefor, having a useful life when new in excess of six (6) months;

(ii) Machinery, equipment, materials and supplies used in a manner that is merely incidental to the manufacturing, processing or fabricating operation such as intraplant transportation equipment, and maintenance and janitorial equipment and supplies.

(iii)Hand tools such as hammers, wrenches, saws, etc., and

(iv) Tangible personal property used by a manufacturer, processor or fabricator in any activities other than the actual manufacturing, processing, or fabricating operation such as office equipment and supplies, equipment and supplies used in selling or distributing activities, in research and development of new products, or in transportation activities. [Current Art.: 20.04 E].

(F) United States; State; Political Subdivisions; Religious, Eleemosynary Organizations. There are exempted from the computation of the amount of the taxes imposed by this Chapter, the receipts from the sale, lease or rental of any tangible personal property to, or the storage, use or other consumption of tangible personal property by:

(1) The United States, its unincorporated agencies and instrumentalities.

(2) Any incorporated agency or instrumentality of the United States wholly owned by the United States or by a corporation wholly owned by the United States.

(3) The State of Texas, its unincorporated agencies and instrumentalities.

(4) Any county, city, special district or other political subdivision of this State.

(5) Any organization created for

religious, educational, charitable or eleemosynary purposes, provided that no part of the net earnings of any such organization inures to the benefit of any private shareholder or individual. [Current Art.: 20.04 (H)].

(N) Sale for Resale: Leasing or Renting.

(1) There are exempted from the taxes imposed by this Chapter the receipts from all sales for resale, leasing or renting

(2) However, if a person purchases tangible personal property for the purpose of leasing or renting it to another person, and if he later sells it by means of an occasional sale before he has collected and paid to this State as much tax on the rental or lease charges as would have been due and payable to this State had he not purchased the tangible personal property for the purpose of so renting and leasing it, he shall, at the time of his

occasional sale of said tangible personal property include in his receipts from taxable sales the amount by which his purchase price exceeded the amount of rents collected by him on said tangible personal property.

(3) When a lessor makes a retail sale of leased tangible personal property to a lessee of that tangible personal property under an agreement whereby certain rental payments are credited against the purchase price of that tangible personal property, he need not collect or pay any tax on the sale price to the extent that he has collected and paid on such rental payments. [Current Art.: 20.04 (O)].

APPENDIX II

JUDGMENT OF THE 126TH JUDICIAL DISTRICT COURT OF TRAVIS COUNTY, TEXAS

APPENDIX II

No. 186,214

126th Judicial District Court
of Travis County, Texas

Day and Zimmermann, Inc.
Plaintiff

And United States of America
Intervenor

v.

Robert S. Calvert, Comptroller of
Public Accounts of the State
of Texas
Defendant

JUDGMENT

On this 16th day of February, 1973, in the above entitled and numbered cause, wherein Day and Zimmerman, Inc. is Plaintiff and the United States of America is Intervenor and Robert S. Calvert, Comptroller of Public Accounts of the State of Texas is Defendant, came the Plaintiff and announced ready for trial, and came the Intervenor and announced

ready for trial, and came the Defendant and announced ready for trial, and the case proceeded to trial before the Court and the Court having duly considered the pleadings on file herein, the stipulation of facts filed by the parties, and the depositions on file with the Court and having heard the evidence and the arguments of counsel and having considered the memoranda of legal authorities filed by each of the parties, and it appearing to the Court that the Defendant had erroneously and illegally collected taxes, penalty and interest from the Plaintiff under the Limited Sales, Excise and Use Tax Act and the Local Sales and Use Tax Act and that the Plaintiff should recover of and from the Defendant the amount of the taxes, penalty and interest so erroneously and illegally collected and now held by the Defendant, together with interest at the rate of six per cent (6%) per annum from

March 6, 1969, the date of payment of such taxes, penalty, and interest by the Plaintiff, to the date of the refund thereof by the Defendant, and it further appearing to the Court that the Defendant had previously erroneously and illegally collected from the Plaintiff certain other taxes, penalty and interest but that the Defendant has heretofore on December 28, 1971, refunded to the Plaintiff a portion of such taxes, penalty and interest and that the Plaintiff should recover of and from the Defendant interest at the rate of six per cent (6%) per annum upon the amount of such taxes, penalty and interest from March 6, 1969, the date of payment of such taxes, penalty and interest by the Plaintiff to October 28, 1971, the date of the refund thereof by the Defendant.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff Day and Zimmermann, Inc. recover of and from the

Defendant, Robert S. Calvert, Comptroller of Public Accounts of the State of Texas, the sum of ONE HUNDRED TWELVE THOUSAND SIX HUNDRED SIXTY EIGHT and 42/100 DOLLARS ($112,668.42) with interest thereon at the rate of six per cent (6%) per annum from March 6, 1969, together with its costs in this behalf expended, for all of which let execution issue.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff, Day and Zimmermann, Inc., do have and recover of and from the Defendant Robert S. Calvert, Comptroller of Public Accounts of the State of Texas the sum of TWO THOUSAND FIVE HUNDRED SIXTEEN and 59/100 DOLLARS ($2,516.59) representing interest at the rate of six per cent (6%) per annum from March 6, 1969, to October 28, 1971, upon the sum of Fifteen Thousand Eight Hundred Forty Eight and no/100 Dollars ($15,848.00) in taxes erroneously and

illegally collected by the Defendant and heretofore refunded to the Plaintiff on October 28, 1971, and for its costs in this behalf expended, for all of which let execution issue.

To which judgment, in open court, the Defendant, Robert S. Calvert, Comptroller of Public Accounts of the State of Texas, excepted and gave notice of appeal to the Court of Civil Appeals for the Third Supreme Judicial District of Texas, sitting at Austin, Texas.

SIGNED AND ENTERED THIS 25th day of May, 1973.

/s/ Herman Jones
District Judge, Travis
County, Texas

APPENDIX III

OPINION OF THE SUPREME COURT OF TEXAS

APPENDIX III

No. B-4512

SUPREME COURT OF TEXAS

Day and Zimmerman, Inc.,
Petitioner,

and

United States of America,
Intervenor,

v.

Robert S. Calvert
Comptroller of Public Accounts
of the State of Texas, et al.,
Respondents.

OPINION OF COURT

Day and Zimmerman, Inc., plaintiffs below, brought this suit to recover taxes paid under protest to the State Comptroller of Public Accounts on materials procured in the performance of its contract with the United States Government who has intervened and is a

party to this action. The trial court entered judgment for Day and Zimmerman allowing recovery of $112,668.42 in taxes, with interest, and an additional sum representing interest on another tax erroneously collected by the Comptroller which had been previously refunded. The court of civil appeals affirmed as to the recovery of interest with respect to the previously refunded tax since the parties on appeal confined the issues to that part of the judgment awarding recovery of the $112,668.42 taxes with interest. This latter portion of the trial court's judgment was reversed and judgment rendered that Day and Zimmerman take nothing by its suit for refund of taxes under the holding of the court of civil appeals that plaintiff purchased materials in the capacity of an independent contractor and not as an agent of the United States Government thereby precluding the appli-

cability of any exception to the levy of the State sales tax. 504 S.W.2d 945. We reverse the judgment of the court of civil appeals and affirm the judgment of the trial court. Day and Zimmerman is the operating contractor of a Government owned ordinance installation which is known as the Lone Star Army Ammunition Plant situated near the City of Texarkana, Texas. All the land, buildings and other structures comprising the Lone Star Plant is wholly owned by the United States Government and under the command of a military officer. Under their contract with the United States, Day and Zimmerman are responsible for the loading, assembling and packaging of ammunition and related components as well as the handling of the mechanics of procurement of all necessary materials, supplies, equipment and services.

The prime contract with the Government is based on what is known as a cost-plus-award-fee arrangement, whereby Day and Zimmerman receives, in addition to a reimbursement for its cost of operation, a fee for each item produced and accepted by the Government and an award fee based on such factors as cost savings, meeting delivery schedules and maintenance of a safety record. As costs are incurred in the performance of the prime contract, Day and Zimmerman submits to Government representatives vouchers requesting payment of such costs. In the normal course of business and as provided in the contract, payment is requested before there has been any actual disbursement of the funds. The voucher is supported by a statement of costs which have been incurred or a listing of checks that had been written in advance. Once checks in payment of the vouchers were received by

Day and Zimmerman, goods purchased were paid for.

Materials and supplies purchased are inspected upon delivery by personnel of Day and Zimmerman with representatives of the Federal Government monitoring these inspections on a random basis. Immediately upon acceptance, the materials are identified whenever feasible by labeling them "US LSAAP" (United States -- Lone Star Army Ammunition Plant). Under the terms of its contract, Day and Zimmerman is required to maintain an inventory of all property located at the ordnance installation and to carry out a program of maintenance, repair, protection and preservation of all such property. However, in the event of loss, destruction, damage or wear beyond repair of plant equipment, the operating contractor is not held financially responsible. Liability would only arise if such items

are lost, destroyed or damaged directly through willful misconduct or lack of good faith on the part of a major official of Day and Zimmerman.

Pursuant to the provisions of the Limited Sales, Excise and Use Tax Act, Title 122A, Chapter 20, Tex. Tax. - Gen. Ann. Stats., and the Local Sales and Use Tax Act, Article 1066c, Tex. Rev. Civ. Stat. Ann., the Comptroller conducted an audit on Day and Zimmerman for the period beginning April 1, 1964, and ending October 1, 1968.[1] The audit involved the tangible personal property, not including any of the component parts that went into the finished product, purchased and consumed by the operating contractor in the

[1] All statutory references hereafter shall be from the Limited Sales, Excise and Use Tax Act, Chapter 20. Taxation-General, Vernon's Annotated Civil Statutes, unless otherwise indicated.

performance of its contract with the Federal Government. Upon the basis of this audit the Comptroller made a deficiency determination which was assessed against Day and Zimmerman. Upon payment, the plaintiff filed an administrative claim for refund of the amount paid, however, after a hearing on the matter, the deficiency determination was upheld by the Comptroller.

As previously stated, the court of civil appeals decision turned on the determination of the question of whether Day and Zimmerman, in all phases of its performance including the procurement of materials, acted as an independent contractor making it liable for the sales taxes, or, whether the plaintiff acted as an agent of the United States so as to cause these sales to be exempt from tax under articles 20.04 (C) and (H). In support of that court's conclusion that Day and Zimmerman were not agents of the

Federal Government, the prime contract with the Government provides:

> [T]he contractor, as an independent contractor and not as an agent of the Government, shall, upon the terms, conditions and provisions herein set forth, furnish all personnel, labor, equipment, supplies, materials...

The "Terms and Conditions" attached to the purchase order form used by Day and Zimmerman in procuring goods and services pursuant to their contract with the Federal Government also lead to the conclusion that Day and Zimmerman was the entity to whom the title to the goods passed, rather than the Government. The "Definitions" section states that "'Buyer' means Day and Zimmerman" and the section entitled "Buyer's Status" reads

> All rights and claims of every kind and nature, including the right to title and ownership of the goods or services covered by this Purchase Order, may be assigned and transferred by Day and Zimmerman, Inc. to the United States Government; however, this Purchase Order

> does not bind or purport to bind the United States Government or any officer thereof.

This provision plainly contemplates that Day and Zimmerman is to purchase, in its own name and on its own credit, all the materials required and that the Government is not to be bound by the purchase contracts, but rather is obligated only to reimburse the plaintiff according to the prime contract. See Alabama v. King and Boozer, 314 U.S. 1 (1941). In view of these facts we agree that Day and Zimmerman assumed the status of an independent contractor and that no direct sales by the vendors to the Federal Government, as contended by the plaintiff, resulted from this arrangement.

Day and Zimmerman alternatively contends that if it was not an agent of the Federal Government, procuring direct sales of materials to the United

States, that the sales were nevertheless not taxable under the "Sale for Resale" exemption found in article 20.04(O).[2] This exemption states in part:

> Sale for Resale: Leasing or Renting
> (1) There are exempted from the taxes imposed by this Chapter the receipts from all sales for resale, leasing, renting or for transfer as an integral part of a taxable service rendered in the regular course of business.

Article 20.01, the definitional section of the Limited Sales, Excise and Use Tax Act, defines a "Sale for Resale" in subdivision (S) as being

> A sale of tangible personal property to any purchaser who is purchasing said tangible property for the purpose of reselling it within the geographical limits of the United States of America, its territories and possessions, in the normal course of business

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[2] It should be noted that this exemption is also incorporated by reference into the Local Sales and Use Tax Act, Article 1066c under section 6C(1) of that act.

> either in the form or condition in which it is purchased, or as an attachment to, or integral part of, other tangible personal property.

We must determine, therefore, whether a sale took place between the vendor and Day and Zimmerman, and thereafter, whether a sale between Day and Zimmerman and the Federal Government occurred. The court of civil appeals, while holding that Day and Zimmerman did acquire title, however fleeting, did not discuss when a resale, if any, took place. We again turn to the definitional section where the term "sale" is defined in article 20.01 (K) (1) (a):

> "Sale" means and includes any transfer of title or possession, or segregation in contemplation of transfer of title or possession, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration.

This being a specific definition by the legislature of the term "sale," such is binding on the courts. Hurt v. Cooper,

130 Tex. 433, 447-448, 110 S.W.2d 904-905 (1937). As construed by this Court in Gifford-Hill and Co. v. State, 442 S.W. 2d 320 (Tex. 1969), when materials are loaded upon trucks of a common carrier or other means of transportation, a "segregation in contemplation of transfer of title or possession" occurred and a sale takes place between the vendor and vendee under the provisions of the Limited Sales, Excise and Use Act.

In determining whether a sale took place between Day and Zimmerman and the Federal Government, the pertinent inquiry to be made under the facts of the instant case and the definition of a sale set out above is whether there was a transfer of title or possession from Day and Zimmerman to the United States. As between Day and Zimmerman and its vendor, title to the materials and supplies purchased was to vest in Day and Zimmerman, under

the "Terms and Conditions" attached to the purchase order used by Day and Zimmerman, as follows:

> Title to goods purchased hereunder shall pass to Buyer (Day and Zimmerman) on acceptance thereof. However, all such goods are subject to inspection by Buyer and the Contracting Officer (for the Federal Government) at the designated delivery point within a reasonable time after arrival and Buyer reserves the right to reject any goods which do not pass such inspection.

Title therefore appears to have vested in Day and Zimmerman after inspection and acceptance at the Lone Star Plant, although, as previously stated, the "sale" between Day and Zimmerman and its vendor took place when the goods were readied for shipment to the plant. With reference to the transfer of title from Day and Zimmerman to the Government, after the inspection and acceptance of the materials by Day and Zimmerman, they were labeled as property of the Federal Government.

Additionally, the prime contract between Day and Zimmerman and the Government recites that

> [T]itle to all property purchased by the Contractor (Day and Zimmerman), for the cost of which the Contractor is entitled to be reimbursed as a direct item of cost under this contract, shall pass to and vest in the Government upon delivery of such property by the vendor.

Giving effect to such language in a contract is in consonance with Section 2.401 (a), Tex. Bus. and Comm. Code Ann. wherein it is stated that "title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties."

In view of the distinct, identifiable transactions between Day and Zimmerman and its vendor and Day and Zimmerman and the Federal Government, it is clear that the initial purchases by Day and Zimmerman were not taxable under the "Sale for Resale" exemption. Art. 20.04 (O).

Additionally, the second sale between Day and Zimmerman and the Federal Government is also exempt under both articles 20.04 (C) and (H) since they are sales the State is "prohibited from taxing under the Constitution or laws of the United States or under the Constitution of this State"; and constitute "the receipts from the sale,... of any taxable items to,...[t]he United States, its unincorporated agencies and instrumentalities."

The judgment of the court of civil appeals is reversed, and the judgment of the trial court is affirmed.

James G. Denton
Justice

Opinion delivered January 29, 1975.

No. B-4512

SUPREME COURT OF TEXAS

Day and Zimmerman, Inc.,
Petitioner,

v.

Robert S. Calvert
Comptroller of Public Accounts
of the State of Texas, et al.,
Respondents.

Petitioner's motion for rehearing, filed in the above numbered and entitled cause on February 12, 1975, having been duly considered, it is ordered that said motion be, and hereby is overruled.

March 5, 1975